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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CURTIS LEE JOHNSON,

Petitioner,

vs.

JAMES SPALDING, DR. ROBERT JONES, THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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Counsel for Petitioner

The petitioner, Curtis Lee Johnson, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on February 18, 1982 affirming the denial of petitioner's application for a writ of habeas corpus.

QUESTIONS PRESENTED

(1) Does an instruction which requires in part:

> "When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon the defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt."

violate the 14th Amendment Due Process Clause under the standard of Cupp v. Naughten, 414 U.S. 141, (1973) and Engle v. Isaac, ___ U.S. ___, (April 5, 1982)?

(2) Should a District Court reviewing a state criminal conviction under 28 USC 2254

(a) consider a series of trial errors, each one affecting a constitutional right, but no single one amounting to prejudicial error, under a cummulative error standard viewing the trial as a whole or only individually and in isolation?

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 669 F.2d 589. The opinion of the United States District Court for the Eastern District of Washington is reported at 510 F. Supp. 164. The opinion of the Court of Appeals, Division III of the State of Washington is reported at 19 Wn.App. 200, 574 P.2d 741 (1978). Copies of each are attached in the appendix to this petition.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was entered on February 18, 1982 and this petition for certiorai was filed within 90 days from that date pursuant to Rule 20 of this court. Jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Amendment IV:

...; nor shall any state deprive any person of ..., liberty ..., without due process of law,...

Amendment VI:

In all criminal proceedings, the accused shall enjoy the right...to be confronted with the witnesses against him; ... and to have the assistance of counsel for his defense.

United States Code, Title 28

§2254(a):

...a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Petitioner, a black, older prison inmate in the Washington State Penitentiary in Walla Walla, Washington was tried for the murder of another inmate which occurred on January 7,

1976 (C.P. 1). Petitioner denied that he was the killer and called 24 witnesses who testified that he was not the person who committed the murder. The state called 14 witnesses, 5 of whom (all prisoners) identified the petitioner as the killer. No forensic or corroborative evidence was offered to establish the identity of the killer. The only issue of fact to be resolved by the jury was whether Mr. Johnson was the killer.

The state's case against Mr. Johnson was based entirely on testimonial proof; no physical evidence introduced at trial linked Mr. Johnson to the homicide, or corroborated the testimony of the state's witnesses. Evidence intoduced by both sides during the trial served only to bolster or impeach the credibility of various eyewitnesses and alibi witnesses. Substantial inconsistencies, bias or prejudice existed in the testimony of every key witness for both prosecution and defense.:

Typical Examples of Inconsistencies: Compare testimony of Carr (R.P. 102-03, 104) with testimony of correction officer Brooks (R.P. 67) concerning Carr's activities on January 6; concerning details of basketball game on January 6. Inconsistencies in testimony of Nabors, Bible and Sorrell discussed in text of brief, supra at p. 6.

Typical Examples of Prior Insconsistent Statements: Lloyd admitted making prior statements exculpating Mr. Johnson (R.P. 239, 257-59, see also testimony of D. Coty, R.P. 535); Bible admitted signing notarized statement exculpating Mr. Johnson (R.P. 169-70, 187-89); Haymaker's testimony was inconsistent with testimony at first trial (R.P. 503-04), as was Bible's (R.P. 182) and Lloyd's (R.P. 269-71).

Examples of Bias, Motive, Prejudice: Carr (R. P. 93, 96), Lloyd (R.P. 242-43, 272, 524), Nabors (R.P. 283), Sorrell (R.P. 317, Iverson (R.P. 594), Haymaker (R.P. 486, 492, L. McLaughlin (R.P. 524-25).

Prior Convictions: All the above mentioned witnesses except Brooks.

Mental Incapacity: Nabors, history of mental illness (R.P. 312-13). All witnesses were either inmates in the penitentiary with motives to lie based upon carrying favor with the state or groups within the penitentiary; or were on parole with potential fear of retaliation by either the state or the groups within the penitentiary; or were themselves potential suspects in the homicide.

After deliberation, the jury was unable to agree upon a verdict and a mistrial was declared. On retrial after a change of venue

to the opposite side of the state, the defendant was convicted on virtually an identical trial record.

During the second trial, the jury was instructed in part:

> "A defense interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed.
>
> When the state makes out such a case as would sustain a verdict of guilty and the defendant offers evidence as to an alibi, the burden of proof is upon such defendant insofar as that alibi is concerned. However, it is not incumbent upon the defendant to prove the alibi beyond a reasonable doubt." (See Appendix for full instruction).

The only definition of reasonable doubt given to the jury stated in part:

> "The expression reasonable doubt means in law just what the words imply--a doubt founded on some good reason. It must arise from the evidence or lack of the evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fair-minded man might with reason entertain consistently with a con-

scientious desire to ascertain the truth." (Emphasis added.)(See Appendix for full text.)

In both opening statement and closing argument the prosecutor was allowed to argue that "the defense has the burden of proof to make the state prove its case beyond a reasonable doubt," (RP.1) and that "they [the defense] have the duty to call witnesses" (RP 50).

At the second trial, the defense did not call one of the prisoner witneses who the prosecution had been notified might testify. (Under Washington law, the defense must disclose the identity and expected testimony for all witnesses other than the defendant; see Washington Court Rules Cr R 4.7(b)(1)). Over objection and motion in limine, the prosecution was allowed to argue a "missing witness inference" against petitioner; i.e., that this witness would have disclosed that the alibi was false and that the jury could infer this from the failure of the defendant to call the witness to the stand. The missing witness

was in the custody of the state and available to be called by the state.

Lopez Bible, one of the witnesses who testified for the state in Petitioner's first trial and who had denied being offered consideration for early parole as an inducement to testify, was on parole in California at the time of the second trial. Over objection, his testimony from the first trial was allowed to be read to the jury in lieu of being returned to testify. After petitioner's conviction, Bible returned to Washington and gave an affidavit retracting his earlier testimony and admitting he had been offered a deal to testify in the first trial.

During cross examination of one of the critical prosecution witnesses, Bruce Lloyd, petitioner's counsel attempted to question Lloyd on matters concerning parole violations and other charges and the subsequent reinstatement of parole which were contemporaneous with Lloyd's decision to testify against

petitioner. The purpose of the offered inquiry was to determine the effect the reinstatement of parole and dismissal of an investigation had upon Lloyd's motive to testify as a State's witness (RP 263-65). The state objected to this line of questioning and was sustained. Later, in the defense case, petitioner tried to offer the testimony of Lloyd's wife, Loretta McLaughlin. Mrs. McLaughlin testified in an offer of proof outside the presence of the jury that she and Lloyd were transporting narcotics to the penitentiary when they were arrested and imprisoned for possession of heroin in late March, 1976. (RP 453). Lloyd posted bond and went to Seattle, where he obtained $1,500.00 from Mr. Johnson's fiance, Veryl Yarnes, by representing to her that the money would be used to bribe a prosecutor in Walla Walla "to get Curtis off." (RP 453). The $1,500.00 was actually used to post bond obtaining Mrs. McLaughlin's release from jail (RP 454). The two then fled the state and

traveled to California, where Lloyd supported himself for two months by selling heroin (RP 455-56). Two weeks after they arrived in California, Lloyd told Mrs. McLaughlin that he was the murderer and not Petitioner. (RP 455). At this time Lloyd and Mrs. McLaughlin were joint fugitives and co-conspirators in several criminal activities. Ultimately, the jury was only allowed to hear the testimony of Mrs. McLaughlin concerning Lloyd's admission to the crime (RP 522-26) which was severely limited in scope. The rest of her testimony was ruled irrelevant even though it clearly showed a motive and interest on the part of Lloyd.

At the second trial, all of the prosecution witnesses who were prisoners testified in civilian clothes while all of petitioner's witnesses testified in prison issue clothing.

Petitioner was convicted of murder 1° and sentenced to life in prison.

Each of the above issues was raised, argued and reached on direct appeal to the

Washington Court of Appeals Div. III; review denied, Washington Supreme Court October 6, 1978, see opinion in appendix. Each was again raised before the District Court for the Eastern District of Washington by writ of habeas corpus, see opinion in appendix; and before the Ninth Circuit Court of Appeals; see opinion attached. Jurisdiction in the original federal proceeding in the District Court was based upon 28 USC §2241(d) and 28 USC §2254(a) see opinion p. 2 attached in appendix. Petitioner argued that he was denied due process of law, confrontation, and effective assistance of counsel under the 14th amendment due process clause and the incorporated 6th amendment guarantees. Petitioner argued that each of these issues was of constitutional magnitude and that collectively he had been denied a fundamentally fair trial.

ARGUMENT

(1) THE DECISION BELOW DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE

SETTLED BY THIS COURT AND WHICH HAS SPLIT THE LOWER COURTS:

This court has never decided on the merits whether an alibi instruction which shifts the burden of proof to a defendant as does instruction #13 set out in the appendix violates the due process clause of the Fourteenth Amendment by removing the burden of proof from the prosectuion on "a fact necessary to constitute the crime with which he is charged," In re Winship, 397 U.S. 258 (1970). See also Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977).

Alibi is not an affirmative defense but is a denial of each and every element of the crime with which defendant is charged and which the state must prove beyond a reasonable doubt. The Patterson majority stated,

> "We will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which

the defendant is charged," Patterson v. New York, 432 U.S. 197, 210."

"Accordingly, while a state may place upon defendant the burden of proving facts supporting an affirmative defense in justification of a crime, a state could not classify an alibi as an affirmative defense and place the burden of proof on the defendant because an alibi is really another way of denying guilt." Rogers v. Redman, 457 F. Supp 929, 932 (D.C. Del. 1978).

In Rogers v. Redman the petitioner brought a habeas petition challenging an alibi instruction similar to the charge in issue here. The district court following the test as dictated in Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed 2d 368; "whether the ailing instruction by itself so infected the entire trial so that the resulting conviction violates due process." That court held that in view of directly conflicting evidence at trial, although it included strong evidence

on behalf of the government, the error in the instructions which contained legally correct instructions but also directly and in unmistakable terms obliged the defendant to prove his alibi, was not harmless error.

> "If there was a reasonable doubt as to whether the petitioner was present at the time and place the alleged offenses were committed, the jury had to find the petitioner not guilty. It is the burden of the state to prove beyond a reasonable doubt that the alibi offered is not true. (3rd Cir. 1971) cert. denied, 414 U.S. 820, 94 S.Ct. 45, 38 L.Ed 2d 52 (1973)."

Rogers v. Redman, supra 933.

An instruction shifting the burden of proof on an alibi issue also violates the defendant's corollary right to a presumption of innocence:

> "By shifting the burden of proof to a person who claims to have been elsewhere at the time of the crime, there is created an irrational and arbitrary presumption of guilt. It arises not by reason of a proof of fact from which a fair inference might be drawn, but from the mere happening that the defendant offers testimony in an

> attempt to establish innocence. When this occurs, unless the defendant can succeed in over-balancing the state's evidence, the jury is expressly told he cannot be acquired by reason of his sole claim to innocence. There is thus a prejudgment of a conclusion which the jury should reach of its own volition.*** [T]his presumption would conflict with the over-riding presumption of innocence with which the law endows the accused and which extends to every element of the crime."

United States v. Beedle, 463 F.2d 721, 724 (3d Cir. 1972), quoting Stumpf v. Bennett, 398 F.2d 111, 116 (8th Cir. 1968), cert. denied. 393 U.S. 18, 89 S.Ct. 483, 21 L.Ed 2d 466 (1969). Although the Third Circuit did not reach the constitutional issue in Beedle, subsequent decisions of this Court have held that the presumption of innocence is a constitutionally protected right. See Cool v. United States, 409 U.S. 104, 93 S.Ct. 354, 34 L. Ed 2d 335; Cupp v. Naughten, supra, 414 U.S. at 149-50, 94 S.Ct. 396.

The alibi instruction in Mr. Johnson's trial was also defective in that it not only put the burden of proof on petitioner as to alibi but further charged the jury to consider all the evidence including that of alibi, in determining the guilt of the defendant beyond a reasonable doubt ..., therefore, the jury had a "choice" of applying the two conflicting burdens of proof. A jury may not, however, have such an option to ignore the reasonable doubt test on the issue of identity in a criminal prosecution. "The constitution and more specifically the due process clause of the fourteenth amendment, permits of no such choice." Smith v. Smith, 454 F.2d 572, 578 (5th Cir. 1971).

See also Stumpf v. Bennett, 398 F.2d 111 (8th Cir. en banc 1968); Wright v. Smith 569 F.2d 1188, (2nd Cir. 1978); Thomas v. U.S. 213 F.2d 30 (9th Cir. 1954); Graham v. Maryland, 454 F.Supp 643 (D. Md. 1978); Thorton v. Stynchcombe, 481 F.2d 1175 (5th Cir. 1973);

U.S. v. Alston, 551 F.2d 315 (D.C. Cir. 1976); U.S. v. Booz, 451 F.2d 719 (3d Cir. 1971); U.S. U.S. v. Beedle, 463 F.2d 721 (3rd Cir. 1973); and Smith v. Smith, 464 F.2d (5th Cir. 1972).

Despite the extensive history of lower court consideration of the due process implications of an alibi instruction, this court has never resolved the issue. Since the court decided Cupp v. Naughten, supra, the lower courtshave split see e.g., Rogers v. Redman, supra, and the instant case. These conflicts and the important and recurring nature of the issues justify the grant of certiorari.

(2) THE DECISION BELOW RAISES RECURRENT AND SIGNIFICANT PROBLEMS OF THE PROPER SCOPE OF REVIEW UNDER 28 USC 2254(1).

This court, beginning with Wainright v. Sykes, 433 U.S. 72 (1977), Cupp v. Naughten, supra, Henderson v. Kibbe, 431 U.S. 145 (1977), 431 U.S 145 (1977), and more recently in Rose v. Lundy, 102 S.Ct. 1198 (1982) and Engle v. Isaac, supra, has attempted to clarify the

scope of review of a state court conviction in federal habeas corpus. One substantial and recurrent problem has not yet been considered by this court: where several errors occurred at trial, each properly preserved for federal review (Wainright v. Sykes, supra), and where each of the errors affects a federal constitutional guarantee; but where each error may singly be lacking in prejudice, should a district court consider the cumulative effect of the errors?

In Cupp v. Naughten, supra 146-147, and Henderson v. Kibbe, supra 154, this court stated that

> "a single instruction to a jury may not be judged in isolation, but must be viewed in the context of the overall charge."

The Ninth Circuit affirmed the district court in refusing to review the instruction errors claimed in the full context of the case but instead viewed them each in isolation. The essence of petitioner's claim

was that he had been "the victim of a fundamental miscarriage of justice... "Engle v. Isaacs, supra, because the cumulative effect of each instruction argument and evidentiary error, collectively, denied him a fair trial. The reviewing court below isolated each claimed error and analyzed it assuming each error was the only one. No collective effect to establish the "cause and prejudice" standard of Engle v. Isaacs, supra was done.

In this case petitioner showed the following errors affecting the burden of proof which had constitutional effect:

(1) The burden of proof on alibi--see discussion part (1) supra.;

(2) A misstatement of the definition of reasonable doubt as substantial doubt is the only explanation of reasonable doubt given to the jury; see U.S. v. Athens, 487 F.2d 257 (8th Cir. 1970); Dunn v. Perrin, 570 F. 2d 21, 25, (1st Cir. 1978), U.S. v. Rodriguez

585 F.2d 1234, 1241-42 (5th Cir. 1978), U.S. v. Muckenstraum, 515 F.2d 568, 570-71 (5th Cir. 1975), Young v. Wyrick, 451 F.Supp. 576, 583-84 (W.D. Mo. 1978), U.S. v. Shaffner, 525 F.2d 1021 (7th Cir. 1975), U.S. v. Gratton, 525 F.2d 1161, 1162 (7th Cir. 1976), U.S. v. Crouch, 528 F.2d 625, 630 (7th Cir. 1976), U.S. v. Flannery, 451 F.2d 880, 881-82 (1st Cir. 1971). See also Taylor v. Kentucky, 436 U.S. 478, 488 (1978).

(3) A missing witness inference was allowed to be drawn against petitioner because he failed to call one prisoner witness out of 24 possible witnesses he was compelled to notify the prosecution might testify although that witness was available to the prosecution and in their custody. The prosecutor stated:

> "In trying a case, the state can call witnesses. The defense has that same right. They have the duty to call witnesses. It was very interesting in this trial there is another man that was there, by their own witnesses, Leo the Bandido Larson. He was there the night before. He was there that next morning. His name

> appeared. Mr. Schacht called the witness Wednesday. We were served a witness list. We have to exchange witness lists under the requirements. We were served a witness list with the name of Leo Larson who we referred to as Leo the Bandido. He did not appear here. He was an eyewitness. He was a witness that the defense had." (RP 50-51 emphasis added).

See Wynn v. U.S., 397 F.2d 621, 625, fn. 23, (D.C. Cir. 1967), Combs v. U.S., 399 A.2d 1313, (D.C. App. 1979), U.S. v. Graves, 150 U.S. 118, 14 S.Ct. 40, L.Ed. (1893), U.S. v. Busic,587 F.2d 23, 25-26 (1st Cir. 1964)., U.S. v. Young, 463 F.2d 934, 940 (D.C. Cir. 1972).

These three errors, all raising constitutional questions of due process by shifting the burden of proof and confusing the standard of proof for the jury raise the "fundamental miscarriage of justice" standard of Wainwright v. Sykes, supra, and Engles v. Isaacs, supra, when viewed collectively which the District Court refused to do. Opinion pp. 7-8.

Similarly, petitioner's other claimed errors affected his right to confront and properly present evidence of his innocence and were a further compounding of the effect of the first three errors, supra.

(4) The restrictions on cross examination and extrinsic impeachment of one of the key prosecution witnesses, Bruce Lloyd, see Davis v. Alaska, 415 U.S. 308 at 318 (1974); Patterson v. McCarthy, 581 F.2d 220 (9th Cir. 1978); U.S. v. Mayer, 556 F.2d 245 (5th Cir. 1977); Annuziato v. Munson, 566 F.2d 410 (2d Cir. 1977); Alford v. U.S., 282 U.S. 687 (1931) U.S. v. Mayer, 556 F.2d 245 (5th Cir. 1977) and U.S. v. Ouori, 535 F.2d 938 (1976).

The trial court's ruling did not allow "the maximum opportunity to test the credibility of the government's witness," United States v. Rodriguez, 439 F.2d 782, 783 (9th Cir. 1971). This affirmative and necessary testimony should have been allowed, Greatreaks v. United States, 211 F.2d 674 at 676 (9th

Cir. 1963) and United States v. Blackwood, 456 F.2d 526, 530 (2d Cir. 1972), cert. den. 409 U.S. 863.

(5) The denial of confrontation of another of the prosecution witnesses, Lopez Bible, by allowing his previous testimony to be read without an adequate showing of necessity. After trial Bible admitted that he had been offered a deal to testify which he had denied at his first appearance. These facts which would have been elicited on cross examination had he been put on the stand and were critical in showing the bias and interest of other state witnesses who identified the defendant. See cases cited in (4) supra; Barber v. Page, 390 U.S. 719, (1968); and Pointer v. Texas, 380 U.S. 400 (1963).

(6) Similarly, the last of petitioner's errors was the lack of effective assistance of counsel by his trial lawyer to offer his alibi witnesses' testimony in a credible manner by calling the witneses to the stand

in prison uniforms while the state witnesses were not similarly clad. Similarly, his trial counsel failed to even research or know the law of alibi in presenting his case to the jury. (See affidavit of counsel in appendix). Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. en banc, 1978) and U.S. v. DeCoster, 624 F.2d 196 (D.C. Cir. 1976).

Petitioner argued to the District Court that the combined effects of the above claimed errors collectively created a denial of due process. The district court's rejection of this argument ignores the dictates of Winship supra, and other controlling authority.

In Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed 2d 580 (1979) the court quoting Winship said:

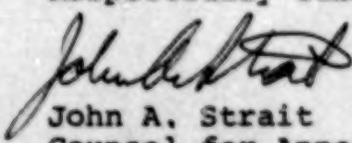
"The Winship doctrine requires more than simply a trial ritual. A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the

facts of the case." Id. at 317-17

"A federal court has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court. For example, on direct review of a state court conviction, where the claim is made that an involuntary confession was used against the defendant, this court reviews the facts to determine whether the confession was wrongly admitted into evidence. [citations]. The same duty obtains in federal habeas corpus proceedings. Townsend v. Sain, 372 U.S. 293, 318, U.S. 443, 506-07, 73 S.Ct. 397, 97 L.Ed 469 (19).

This issue of the effect of cumulative constitutional error justifies the grant of a writ of certiorari to review the judgment below.

Respectfully submitted,



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